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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, *Attorney General, as Successor to the Alien Property Custodian,*
Petitioner,

vs.

ANTONA ALLEN, GERTRUDE DIXWHDDIE, HILDA PIGOZZI, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 15-21) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 29-40) is reported in 156 F. (2d) 653.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 22, 1946. (R. 41.) A petition for amendment of the opinion was denied by an order entered on July 17, 1946. (R. 41.) On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was granted on December 9, 1946. (R. 42.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Article IV of the Treaty was abrogated or suspended by the declaration of war with Germany and the subsequent collapse of the German state, or otherwise rendered inoperative from the time of the declaration of war, by the provisions of the Trading with the Enemy Act, as amended.

2. Whether Article IV of the Treaty of 1923 with Germany is in conflict with the California statute and hence overrides the statute.

3. Whether Sections 259, 259.1 and 259.2 of the California Probate Code are invalid as an invasion of the Federal field of control over foreign affairs.

4. Whether the amendment of the California statute in 1945, pending this appeal, governs upon appeal.

TREATY AND STATUTES INVOLVED.

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. 56-60.

STATEMENT.

Pursuant to paragraph 4 of Rule 27, Revised Rules of the Supreme Court of the United States, respondents adopt the Statement contained in petitioner's brief (Brief for Petitioner pp. 3-6), with the exception of the closing sentence thereof. (Brief for Petitioner p. 6.) This last sentence of the Statement refers to the opinion of the Circuit Court of Appeals for the Ninth Circuit (*Allen v. Markham*, 156 F. (2d) 653, 663; R. 29-40) and characterizes the opinion as holding that the California reciprocal inheritance statute "as it was amended imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian. (R. pp. 39-40.)" (Brief for Petitioner p. 6.)

Respondents' statement characterizes the opinion of the Court below as holding that the amended statute does not apply upon appeal, that this case must be governed by the law as of the date of the decedent's death, e.g., Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895), that the rights and interests of all parties are determined by the law as of that date, and that, therefore, the burden of proof of the existence of reciprocal inheritance rights remains upon the Custodian. (R. p. 40.)

SUMMARY OF ARGUMENT.

I.

Article IV of the Treaty of 1923 with Germany was abrogated, or at least suspended, by the declaration of war. The existence and continued operation of a Treaty of Friendship and Commerce is incompatible with a state of belligerency under modern conditions of war. It is particularly incongruous to hold that such a treaty survives a declaration of war in order to benefit enemy aliens actually resident in the enemy country. In addition, as a matter of real fact, the treaty cannot survive the complete collapse of the German state, which creates a condition under which mutuality of consent and performance by the parties thereto becomes impossible. The Trading with the Enemy Act, as amended, is, further, a federal statute, later in time, and in terms irreconcilable with Article IV of the treaty which must be held to fall thereby.

II.

Article IV of the Treaty of 1923 with Germany does not override the California statute because there is no conflict between the two. Implicit in the operation of the statute is recognition of the existence of the treaty making power of the Federal Government—if the treaty is in effect, the statute implements and executes its terms; if the treaty no longer exists, then the statute predicates a valid state policy, and denies rights of inheritance to aliens not protected by any treaty. In any event, paragraph two of Article IV of the Treaty does not provide for reciprocity of in-

heritance rights as to estates of personalty left by American nationals.

III.

The California statute is not invalid as an invasion of the federal field of control over foreign affairs, simply because the statute does not reach into such field. The statute merely regulates a field which in both theory and practice has always been within exclusively state jurisdiction, namely rights of inheritance. That the statute may determine rights of peoples living in foreign countries is merely an incidental effect of an otherwise valid exercise of state power.

IV.

The amendment of the California statute in 1945, after decision in the District Court but pending appeal to the Circuit Court of Appeals, does not apply to, nor govern this appeal. The change in law was merely one of procedure, affecting a stage in the case already completed. Changes in procedure after trial and pending appeal do not control on appeal.

ARGUMENT.

I. ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY IS NOT CONTROLLING IN THIS CASE, AND THE CUSTODIAN CANNOT RELY UPON IT TO SUSTAIN TITLE TO THE ESTATE INVOLVED.

A. ARTICLE IV CEASED TO BE OPERATIVE DURING THE PRESENT WAR.

The question of the continued existence of Article IV of the Treaty of 1923 with Germany (see Appendix A, p. i) is one of paramount importance in this case. The Custodian must establish the present effectiveness of this article of the treaty as the fundamental basis of his claim to the estate herein involved. Respondents contend that this treaty is no longer a continuing force, and has not been such for the life of this action; this contention is based on the following three reasons, any one of which alone, is sufficient to support the decision of the Court below: (1) the war with Germany served to abrogate or suspend this treaty; (2) the Trading with the Enemy Act (50 U.S.C. App., 40 Stat. 411 as amended) is a Federal statute, later in date than the treaty, and is so inconsistent with the expressed purpose of the Treaty that it must be held to have abrogated the Treaty; and (3) the complete collapse of Germany, and its loss of international personality as a result of the war has nullified the Treaty. While these three bases are treated separately herein, there is a cumulative effect of all three upon the problem which cannot be disregarded, and which serves, largely, as a factor to distinguish the issue before this court from that in any other case which has come before it, or which has heretofore been decided. In no other case has any

court had to decide the effect of all three of these factors.

1. The effect of the war upon the Tretay of 1923.

There is little agreement among the text writers as to the general effect of war upon treaties as a whole. The views expressed range from the one extreme, that war terminates all treaties,[1] to the other, that war terminates none, with intermediate views involving distinctions between termination and suspension of treaties, and opinions made dependent upon the type of treaty involved and the intent of the parties thereto as to the effect of war.

See:

Lenoir, *The Effect of War on Bilateral Treaties* (1946) 34 Geo. L.J. 129.

There is, however, substantial agreement that certain types of treaties do survive the outbreak of war between the contracting parties. Those treaties, for example, which are concluded with the view of regulating the conduct of the parties, or their nationals, during the hostilities, clearly remain in force during a war, and indeed might be said to come into force only during such war.[2] Similarly, treaties which con-

[1] "Conventions and treaties are broken or annulled when war breaks out between the contracting parties, either because such agreements imply a state of peace, or because each party having the right to deprive the enemy of his property, may take from him such rights as have been given him by treaties." 3 Vattel, *The Law of Nations* (Trans. ed. 1758, Fenwick 1916) Sect. 175. Accord: Baty and Morgan, *War: Its Conduct and Legal Results* (1915) 399; 3 Phillimore, *Commentaries upon International Law* (2d ed. 1873) p. 794; Twiss, *The Law of Nations* (2d ed. 1875) p. 264.

[2] See: Article XXIV, Treaty of 1799 between United States and Prussia (8 Stat. 162, 174).

template a permanent arrangement, such as the establishment of a boundary, or which are otherwise entirely executed, so that nothing remains to be done, and all rights have become vested, cannot be changed by the outbreak of war alone.

Society for the Propagation of the Gospel v. New Haven, 8 Wheat. (21 U.S.) 464.

The Treaty in issue here is of the type known as a commercial treaty, and falls within neither of the two above types which are thought to survive the outbreak of war. It is as to this type of treaty that the major diversity of opinion exists in respect to the effect of war.

As a general, fundamental rule, the law, as expressed by the courts of this country, refuses to admit of any commercial intercourse or the existence of any civil, legal rights as between the nationals of the belligerents.

The Rapid, Fed. Cas. No. 11576 (1812) aff'd 8 Cranch. 155;

Ross v. Jones, 22 Wall. 576 (1874);

United States v. Grossmayer, 9 Wall. 72 (1869);

The William Bagaley, 5 Wall. 377 (1866);

Mdyer v. Garvan, 278 F. 27 (CCA 1, 1922);

Second Russion Ins. Co. v. Miller, 297 F. 404, aff'd 268 U.S. 552;

Griswold v. Waddington, 16 Johns. (N.Y.) 438 (1819).

As stated by Story, J., in *The Rapid, supra,* Fed. Cas. No. 11576, at p. 300:

"War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. All treaties, contracts, and rights of property are suspended. The subjects are in all respects considered as enemies. They may seize the persons and property of each other. They have no '*persona standi in judico*', no power to sue in the public courts of the enemy nation. It becomes in the highest degree criminal to comfort or aid the enemy; and if so, what more important aid can be afforded, than by succoring his necessities in trade, and warding off the blows aimed against his manufactures and commerce. It seem difficult, therefore, for a moment to sustain the opinion, that trade can subsist in a state of utter hostility. That contracts and credits can be valid, where they are liable to confiscation; and property may be passed, when it may be rightfully seized by the mere operations of war".

During the latter part of the last century, certain writers, the precursors of the so-called "modern" school of international law, gave currency to views which diverged from the above.[3] The basic reasons for this divergence can be ascribed only to the conditions of the era in which these authors lived, illustrative again, of the axiom that, in the study of the evolution of the law, "a page of history is worth a volume of logic". These basic reasons have been most aptly described by Dr. John Bassett Moore, Member

[3]Bluntschli, *Droit International Codifie*, Sect. 538; Fiore, *International Law Codified* (Borchard's Trans. 5th Italian ed. 1918) Sect. 859; Hall, *International Law*, 398, 401; 2 Oppenheim, *International Law*, Sect. 99.

of the Permanent Court of International Justice, as follows:

> "In the third quarter of the last century, certain writers on the continent of Europe, espousing the theory that war is 'a relation of state to state, and not of individual to individual', suggested the view that commerce between man and man was a 'natural right' the exercise of which not even war was to be regarded as suspending except so far as it might be expressly and specifically prohibited. * * * (These views) were no doubt influenced by the character of the armed conflicts of their own time, and particularly by that of the short, sharp, and decisive wars of Prussia with Denmark in 1864, with Austria in 1866, and with France in 1870. These contests, like those of France and Great Britain with Russia in 1854-1856, were distinctively military. The commercial and industrial resources of the nations concerned were scarcely involved. Such, it was believed, was to be the type of future international conflicts. They would be decided by what took place on the battlefield, and it would matter little what took place elsewhere.
>
> "Had Heffter, Bluntschli, and others of their school lived to witness the armed conflict through which the world has just passed, rivaling and even surpassing, in its drafts upon commerce and industry, as well as its direct attacks, by land, by sea, and by air, on unarmed civilians, the wars of the eighteenth century and the Napoleonic wars, they would have seen their theories discredited and have perceived the emptiness of the supposition that, while nations are engaged in

an armed struggle, their inhabitants may be commercially at peace."

Moore, *"Effects of War on Commercial Intercourse"*, in Meares, *Trading with The Enemy Act, Annotated* (1924) pp. 445-470.

It is impossible then, to pronounce a generalization which will reconcile all the decisions of the courts or the opinions of the writers. Any attempt to discover a thread of consistency among the authorities based on some intrinsic worth of the theories expressed is futile and illusory in the absence of any demonstration that the fundamental conditions of the era in which the pronouncement was made are approximated in the instant case. The law of treaties is essentially a pragmatic thing, and must be applied with a view to realism and the practical necessities of the moment of history in issue. As evidenced above, the rules espoused by the various authorities were the creatures of the needs of the times. The rule of *The Rapid, supra,* was the product of the harsh and uncompromising Napoleonic wars and the bitter conflicts surrounding the French Revolution; the new school of thought, led by Bluntschli, derived their philosophy from the type of war fought during the nineteenth century, the wars fought by relatively small, professional forces, and which were short and decisive, not engaging the entire resources of the belligerents.

With this in view, it is necessary to consider the decision in *Techt v. Hughes*, 229 N. Y. 222 (1920),

cert. den. 254 U.S. 643, Annotated 11 A.L.R. 166, upon which appellant herein places great reliance and emphasis (Brief for Petitioner, pp. 13-18). It is appellant's contention that the *Techt Case* has settled the law on this subject, and he cites two other state courts which have followed the *Techt Case*,

Goos v. Brocks, 117 Neb. 750;

State ex rel. Miner v. Reardon, 120 Kan. 614.

A careful analysis, then, of the surrounding circumstances, facts, reasoning, and actual decisions in the case of *Techt v. Hughes*, is required. The court in that case stated the facts of the case as follows:

> "James J. Hannigan, a citizen of the United States died intestate on December 27, 1917, seized in fee simple of real estate in the City of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, 20 days before the death of plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed the laws. The plaintiff's capacity on December 27, 1917 to acquire title by descent is the question to be determined." (229 N.Y. at p. 226)

At the time in question, the law of the United States provided that any American woman who married a foreigner should take the nationality of her husband (Act, Mar. 2, 1907, c. 2534 Sec. 3, 34 stat. 1228), and the plaintiff was, therefore, legally an enemy alien at the time of her father's death. The law of New York provided that alien "friends" could inherit in the same manner as citizens (Sect. 10 Real Prop. Law); alien "enemies", therefore, had only such rights as the common law provided and could not take by descent. If the plaintiff were to take, then, it was necessary to establish her right on some other basis than the New York statute or the common law, in short, on the basis of the Treaty of 1848 between the United States and Austria-Hungary (9 Stat. 944), which contained a provision for reciprocal rights of inheritance similar to that of the Treaty of 1923 with Germany, in issue here.

In determining the question of the effect of war on treaties, Judge Cardozo adopted as the major premise for his decision:

> "That provisions compatible with a state of hostilities unless expressly terminated, will be enforced, and those incompatible rejected." (229 N.Y. at 241)

And the decision of the court was that inheritance by enemy aliens who were *resident* in the United States and loyal to this country was not incompatible with the state of war. Judge Cardozo adverted, in the opinion, as the basis for this holding, to the fact

that resident enemy aliens were free to buy and sell property, were to be undisturbed in the peaceful pursuits of their lives and occupations, and were to be accorded the consideration due all peaceful and law-abiding persons. (229 N.Y. 244, citing Trading with the Enemy Act, 40 Stat. 411, ch. 106, and the President's proclamation of December 11, 1917). The actual decision of the court was that to allow inheritance by a resident, loyal "enemy" alien in no way endangered the nation at war, and violated no policy of the federal government. In addition to the considerations referred to in the opinion itself, relating to the status of Austrian nationals resident in this country during the war, Judge Cardozo could not have been unmindful of the pronouncements by official governmental agencies during the war and bearing on the same issue:

> "The declaration of war with Austria-Hungary will not change the status of citizens or subjects of Austria-Hungary resident in this country. Such persons are not included within the term 'enemy' as employed in the Trading with the Enemy Act, and their property in this country will not be molested nor interfered with in any way * * *. There is no reason whatever why such persons should be concerned about their property, real or personal, or their funds in bank, or securities, or other investments. * * * Under the Trading with the Enemy Act the test of enemy character is one of residence and not nationality."
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> Statement by Palmer, Alien Property Custodian, in *The Official Bulletin*, p. 2, No. 180,

Vol. 1, December 10, 1917 also found in For. Rel., (1918) Supp. 2, p. 271.[4]

In addition, there was sound judicial authority that enemy aliens if resident and peaceable were, during the first world war, to have broad and unfettered rights. Thus, in *Arndt-Ober v. Metropolitan Opera Co.*, 169 N.Y.S. 944, a resident, enemy alien was allowed standing in court to bring an action; in *State v. Darwin*, 102 Wash. 402, the court ordered the State Fish and Game Commissioner to issue a fishing license to a resident, enemy alien; and in *Tortoriello v. Seghorn*, 103 Atl. 393, the New Jersey chancellor decreed specific performance of a contract to convey land against resident, enemy aliens whose sole defense was their alleged war-time disability to convey. On the whole, the rationale of these cases of the first world war era was to prevent forfeiture and hardship against peaceable residents of this country. Cf. *Korematsu v. United States*, 323 U. S. 214; *Hirabayashi v. United States*, 320 U.S. 81.

See: Meares, *Trading with The Enemy Act, Annotated* (1924) p. 34.

Techt v. Hughes was, moreover, decided soon after the end of a war, which, although world-wide in effect and scope, differed radically in the stated objectives of this country from the one recently concluded. The clear and avowed objective of the United States in entering the recent war was the complete destruction

[4]See also For. Rel. 1918 Supp. 2, pp. 256, 267, 292.

of the German state, with no distinction made as to its government and people; the demand of the United States was unconditional surrender; and the result of the war was the accomplishment of that very objective—the German state has been destroyed, and its people are entirely dependent upon the victors for the very essence of their lives (see p. 45, infra, *Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers*). The war, the effect of which on the Treaty of 1848 with Austria was in issue, which conditioned the decision of Judge Cardozo had, for the United States, a more moderate objective:

> "We have no quarrel with the German people. We have no feeling toward them but one of sympathy and friendship. It was not upon their impulse that their government acted in entering this war. It was not with their previous knowledge or approval. It was a war determined upon as wars used to be determined upon in the old, unhappy days when peoples were nowhere consulted by their rulers and wars were provoked and waged in the interests of dynasties or of little groups of ambitious men who were accustomed to use their fellow men as pawns and tools." Woodrow Wilson on April 2, 1917, *For a Declaration of War against Germany*, I *War and Peace* (1927) p. 11.

The first World War, fought, in principle, against the enemy governments and not against their misguided and misled peoples, by its very nature was entirely alien from the objectives of World War II. This was a war to the death.

> "I repeat that the United States can accept no result save victory, final and complete. Not only must the shame of Japanese treachery be wiped out, but the sources of international brutality wherever they exist, must be absolutely and finally broken." Franklin D. Roosevelt, *The War Message*, p. 26, (Ritten House, 1942)

The essential difference between the war which conditioned Judge Cardozo and the war which is now in issue, is vividly illustrated by the changes in emphasis in the treatment of enemy property in the first war and in the present war. Section 5 of the Trading with the Eenemy Act (40 Stat. 415, as amended) provided, in pertinent part as follows:

> "During time of war or during any other period of national emergency declared by the President, the President may * * * investigate, regulate or prohibit * * * any transaction * * * in which any foreign state or a national or a political subdivision thereof * * * has any interest."

As originally enacted in the first World War, the function of the Trading with the Enemy Act was to prevent financial aid to the enemy governments, and to conserve the property of individual enemy aliens.

> "Broad purpose of Congress as expressed in Act is first to preserve enemy owned property in the United States from loss, and, second, to prevent every use of it which may be hostile or detrimental to the United States.
>
> "Subject of Germany or any of Germany's allies residing in this country, even though he had made no declaration of intention to become citizen, is

permitted to continue in trade and commerce and in possession and control of his property while he remains in the United States and obeys its laws. * * * There is of course no thought of confiscation or dissipation of property thus held in Trust." Telegram, Secretary of State Lansing to Minister in Netherlands, File, No. 763.72113/402a, For. Rel. 1918, Supp. 2, p. 267. See also: For. Rel. 1918, Supp. 2, p. 292.

By contrast, The First War Powers Act (55 Stat. 838) enacted in 1941, provided flatly for confiscation in the interests of the United States of all enemy property, whether government or individual property.

"* * * and any property or interest of any foreign country or national thereof shall vest * * * upon such terms and conditions as the President may prescribe such interest of property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." Sect. 5, Trading with the Enemy Act as amended by First War Powers Act of 1941. See; "Enemy Property", 11 Law and Contemp. Problems, No. 1 (1945).

The decision of the court in *Techt v. Hughes* then is quite clearly limited by the facts and the background under which the issue arose. The decision was undoubtedly based on the desire of preventing a grave hardship upon a very large number of American women who changed their nationality by marriage, but had continued to reside in and remain loyal to the United States.

See: Note, 15 Ill. Law Rev. 459.

The result of the case violated no national policy relative to the conduct of the war, since subjects of Austria had, throughout the war, been accorded favored treatment, if resident and peaceable.

It was mere dictum, however, for the court to state that even if the plaintiff were a non-resident and were living in Austria, that the policy of the country would be to assure her of title, which the Alien Property Custodian would vest. It would clearly be incorrect to hold that treaty provisions giving inheritance rights continued in effect during the war for the benefit of enemy aliens resident in hostile territory. There is a logical incompatibility between such a view, and the fact that Congress and the executive branch of the government had, by the Trading with the Enemy Act (40 Stat. 411), declared forfeit any such rights, constituting a repudiation, in advance, of any such holding. Further, if such were the law, it is remarkable that the Alien Property Custodian did not, during the era of the first world war, vest any rights growing out of the treaty.[5]

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[5] In fact, the Alien Property Custodian proceeded throughout this period under the assumption that non-resident, enemy aliens could obtain no inheritance rights growing out of such treaties, following the advice of the then Secretary of State:

"The Secretary of State to the Alien Property Custodian (Palmer)

Washington, September 10, 1918.

"Sir: The Department acknowledges the receipt of your letter of August 30, 1918, in which you state that the question has arisen as to the present effectiveness of the treaties with Austria-Hungary and the various states composing the German Empire, 'which permits subjects of those states to take or hold real property in the

To give effect today to the dictum in the *Techt* case would be to fly into the teeth of the realities of the total and totalitarian war we have just come through. To have dedicated the lives and fortunes of the citizens of this country to the utter destruction of an enemy government *and* its people is hardly compatible with a notion that the commercial rights of those enemy peoples, as stipulated in a pre-war treaty, were to be preserved, during the struggle itself. Such a concept violates reason.

It is submitted that the only realistic rule as to the effect of a declaration of war upon treaties, other than those made in reference to war, or those designed

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United States', and request that the Department indicate the attitude it is disposed to adopt in regard to these treaties.

"The Department assumes that you refer to the provisions in Article 2 of the convention of 1848 with Austria-Hungary: • • • and to the somewhat similar provisions in Article 14 of the convention of 1828 with Prussia, to Article 2 of the convention of 1845 with Bavaria, and to similar articles in conventions with other states of the German Empire which were regarded in force on the dates of our entrance into a state of war with Austria-Hungary and Germany, respectively.

"In reply to your inquiry as to the present effectiveness of these provisions of the treaties with Austria-Hungary and the various states composing the German Empire, you are informed that in view of the present state of war between the United States and Austria-Hungary and Germany, the Department does not regard these provisions as now in operation.

"In this relation it may be pointed out that in the absence of applicable treaty provisions the right of an alien to take or hold real property by descent or purchase, or otherwise; in the United States, would, it appears, depend upon the law of the state or territory in which the property may be situated."

"I am, (etc.)

Robert Lansing"

For. Rel. Supp. 2 (1918) p. 309; cited in VI. Hackworth, *Digest of International Law* (1943), p. 327, as contra to the dictum in *Techt v. Hughes*, *supra*. See also, Letter, Sec. of State Bayard to Messrs. L. & E. Lehman, June 23, 1884 (156 Ms. Dom. Let. 80).

to establish a permanent relationship which is already completely executed, is that treaties are suspended during hostilities subject to the right of victorious powers to revive them.[6]

The Head Money Cases, 112 U.S. 580, 599;
Society etc. v. New Haven, 8 Wheat. 464, 494;
Valk v. United States, 29 Ct. Cl. 62, aff'd 168 U.S. 703.

It is very significant to view the practice of states from the close of the Crimean War until the present time, as an indication of the views which controlled the political departments of the various states, those departments charged with concluding and interpreting treaties. Treaties of peace have revealed widespread recognition that former conventions, save those which were designed to regulate the rights of the parties as belligerents, were annulled by the occurrence of war. Frequently a treaty of peace has contained appropriate provision for the reestablishment of prior agreements, or has permitted the temporary operation thereof pending the conclusion of fresh arrangements. Reference to those agreements has assumed various forms; sometimes they have been "con-

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[6]See in this connection, Chitty, *Legal Effect of War on Commerce*, pp. 1-2; Glenn, *International Law*, p. 152; Hall, *International Law*, Sect. 125; Halleck, *International Law and Laws of War*, pp. 371, 398; 2 Hyde, *International Law* (1922 ed.), pp. 91-98, Sections 547-551; 5 Moore, *International Law*, pp. 372-387; 3 Phillimore, *International Law* (3rd ed.), 794, Sects. 530-539; 2 Oppenheim, *International Law* (1940 ed.), Sect. 99; 1 Twiss, *International Law*, Sect. 252; Vattel's *Law of Nations*, Chitty's ed. 371; Wilson, *International Law*, Sect. 85; Annotation, 11 A.L.R. 180; Note, 15 Ill. Law Review 459.

firmed", sometimes "reestablished", sometimes "maintained". In almost every case, however, the compact terminating a war has marked the establishment of a new contractual relationship rather than the modification of an existing one. Arrangements concerning former treaties have not implied a recognition of their survival by operation of law, but simply an acknowledgment of the value of their provisions as a basis for fresh covenants.

See: 2 Hyde, *International Law*, (1922) 95.

Thus, according to Article XXXII of the Treaty of Paris, of March 30, 1856, concluded by Great Britain, Austria, France, Prussia, Sardinia and Turkey, it was declared that:

> "Until the treaties or conventions which existed before the war between the belligerent powers have been either renewed or replaced by new acts, commerce shall be conducted on the basis existing before the war; in other matters, the subjects of the contracting parties shall be accorded the most-favored nation treatment." (*Nouv. Rec. Gen.*, XV 780; Brit. and For. State Pap., XLVI, 17; Phillipson, *Termination of War and Treaties of Peace*, p. 357.)

According to Art. II of the Treaty of Vienna, concluded October 30, 1864, between Austria and Prussia on the one side, and Denmark on the other, "all the treaties and conventions concluded before the war between the High Contracting Parties are reestablished in so far as they are not abrogated or modified by the tenor of the present treaty." (*Nouv. Rec.*

Gen., XVII, Part 2, p. 475; Phillipson, *Termination of War and Treaties of Peace*, p. 260.)

See, also, Art. XIII of Treaty of Prague, of August 23, 1866, between Austria and Prussia (*Nouv. Rec. Gen.*, XVIII, 348; Phillipson, *Termination of War and Treaties of Peace*, p. 370), Article XI of the Treaty of Frankfort, of May 10, 1871, between France and Germany (*Nouv. Rec. Gen.*, XIX, 693; Phillipson, *Termination of War and Treaties of Peace*, p. 387), and Article XVIII of additional convention of December 11, 1871 (*Nouv. Rec. Gen.*, XX, 863; Phillipson, *Termination of War and Treaties of Peace*, p. 391), Article X of Treaty of Constantinople, January 27-February 8, 1879, between Russia and Turkey (*Nouv. Rec. Gen.*, 2 ser. III, 470; Phillipson, *Termination of War and Treaties of Peace*, p. 404.)

According to Article XI of the treaty of peace between Chile and Peru, of October 20, 1883, the commercial relations between the two countries were to be placed, pending the conclusion of a special treaty, on the same footing as prior to April 5, 1879. (Brit. and For. State Pap., LXXIV, 351. See, also, Art. III of treaty of peace between Spain and Chile, of June 12, 1883, *id.* 721; Phillipson, *Termination of War and Treaties of Peace*, p. 412.) In Art. VI of the treaty of peace between Japan and China, of April 17, 1895, all former treaties between those States were regarded as having been abrogated by the war. (*Nouv. Rec. Gen.*, 2 ser., XXI, 644; Phillipson, *Termination of War and Treaties of Peace*, p. 415.)

Article XII of the treaty of peace between Japan and Russia of August 23-September 5, 1905, proclaimed the annulment by the war of the treaty of commerce and navigation between those States. (For. Rel. 1905, 826; Phillipson, *Termination of War and Treaties of Peace*, p. 427.)

Article V of the treaty of peace between Italy and Turkey of October 18, 1912, announced that all the treaties and conventions subsisting between those States prior to the war should again "enter into immediate effect", and that the two Governments, as also their respective subjects, should be placed towards one another in the identical situation in which they had been before the outbreak of hostilities. (*Am.* VII, Supp., 59; *Nouv. Rec. Gen.*, 3 ser. VII, 8; Phillipson, *Termination of War and Treaties of Peace*, p. 431.)

By Article IV of the treaty of peace between Bulgaria and Turkey, of September 16-29, 1913, it was agreed to put into force and for a specified period a former treaty of commerce and navigation, and a specified consular declaration. (Brit. and For. State Pap., CVII, Part 1, 709; *Am. J.*, VIII, Supp. 31; Phillipson, *Termination of War and Treaties of Peace*, p. 443.)

By Article II of the treaty of peace between Turkey and Greece, of November 1-14, 1913, the treaties, conventions and acts subsisting between those States at the time of the rupture of diplomatic relations were to be restored upon the signature of the new

convention. (Brit. and For. State Pap., CVII, part 1, 894; *Am. J.*, VIII, Supp., 46; Phillipson, *Termination of War and Treaties of Peace*, p. 450.)

The conduct of the political departments of the various nations of the world at the conclusion of the first World War is especially significant, both because it was in conformity with the above, and because it bears on the intent of the parties to the treaty in issue. In Article 289 of the Versailles Treaty (The Treaties of Peace 1919-1923, *Carnegie End for Int. Peace*, p. 168) it was provided that each victorious power might, by giving notice to Germany within six months, *revive* such treaties as the victorious power desired.[7]

It appears to have been the general view among observers at the peace conference following the end of World War I that those treaties in effect at the outbreak of the war were considered to have been so affected by the occurrence of hostilities that it was necessary to revive them if it was desired to secure

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[7] Article 289 of the Treaty of Versailles:

"Each of the Allied or Associated Powers, being guided by the general principles or special provisions of the present Treaty, shall notify to Germany the bilateral treaties or conventions which such Allied or Associated Power wishes to revive with Germany.

. . . . . .

"A period of six months from the coming into force of the present Treaty is allowed to the Allied and Associated Powers within which to make the notification.

"Only those bilateral treaties and conventions which have been the subject of such a notification shall be revived between the Allied and Associated Powers and Germany; all others are and shall remain abrogated."

the benefit of their provisions.[8] In other words, they are treated as being *revived* after the war, rather than having *survived* during the period of the war, if they are later invoked. And where no notification was given, the courts of the European states have, apparently, held that the pre-war treaties have been abrogated by the war.[9]

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[8] "• • • The British Government has published no document showing the conclusions formed by it upon the effect of the Great War upon the different classes of treaties existing in 1914 between Great Britain and enemy powers. But an examination of the preparatory work done in anticipation of the Peace Conference and of Part X, Section ii of the Treaty of Versailles • • • suggests that the policy of the British negotiators in this respect • • • was probably based upon the following legal conclusions:

"(i) Bilateral Treaties—All treaties between Great Britain and an enemy State were regarded as *ipso facto* terminated by the war and as requiring express revival by the Treaty of Peace if it was desired that they should be in force again upon the conclusion of peace." McNair, *Law of Treaties* (1938), 548-551.

[9] The German Reichsgericht held, on May 23, 1925, that the provisions of the commercial treaties between Germany and Russia of February 10, 1894 and July 28, 1904, entitling their subjects to acquire real property in the territories of the other party, had lost their validity upon the outbreak of war. *Annual Digest*, 1925-1926, Case No. 331; XXXVI, *Zeitschrift für internationales Recht* (1926), 408. Cited in Hackworth, *Digest of International Law*, (1943), V, p. 379.

Appellant contends (Brief for Petitioner, p. 25, footnote 7) that the court below was in error in assuming that the treaty of 1828 was terminated by the war, and states that this treaty was terminated by the failure to give notice as required by the Treaty of Berlin, which extended to the United States the benefits of Article 289 of the Versailles Treaty. As to this contention, it is significant to note that the Italian Court of Cassation, in 1929, held that the effect of Article 289 of the Treaty of Versailles was not itself to abrogate Article 5 of the Italo-German convention of January 15, 1892 with respect to patents, but that the Treaty of Versailles merely confirmed the rule under which the outbreak of war between Germany and Italy extinguished that convention. *Società Walter Kidde v. Società Deutsche Werft*, *Annual Digest*, 1929-1930, Case No. 281; 21 *Rivista di diritto internazionale* (1929) 418-420, cited in Hackworth, *Digest of International Law* (1943), V, p. 381.

The United States refused to join in ratifying the Treaty of Versailles, and peace between this country and Germany was concluded by the Treaty of Berlin of 1921. (42 Stat. 1939.) This treaty contained an article identical with that of article 289 of the Treaty of Versailles. (42 Stat. 1943.) In 1921, Congress had passed a joint resolution (40 Stat. 1943, July 2, 1921) which in effect had appropriated or confiscated all property of Germany of German Nationals which on or since April, 1917, had come into the possession or control of the United States. This resolution was held in *Cummings v. Deutsche Bank,* 300 U.S. 115 (1936) to have vested title to such property absolutely in the United States. The treaty of Berlin in 1921 had ratified the action taken under the resolution. The Treaty of 1828 with Prussia contained an article substantially similar to Article IV of the present treaty (Treaty with Prussia, May 1, 1828, Article XIV, 8 Stat. 378) relating to reciprocal rights of inheritance. If the treaty of 1828 survived the outbreak of war, and thus guaranteed property rights in German nationals by way of inheritance during that war, it would not have been necessary to have negotiated a new convention covering the same ground in 1923. The historical facts demonstrate, however, that the government of the United States, during the war, confiscated property belonging to German nationals, otherwise protected by a treaty, and, subsequently, we have the consent and ratification of the German government to this action. It would not appear likely that, pursuant to such a course of conduct followed

on a similar occasion, the same parties would intend or believe that the Treaty of 1923, unlike the Treaty of 1828, its predecessor, would survive a war.

The practice of nations, then, when dealing with the actual, practical fact of the effect of war on treaties, has not been to assume their continued existence. The action of victorious powers at the peace conference table in reviving pre-war treaties is the revitalization of treaties which were suspended in effectiveness during the hostilities, and marks a new contractual arrangement covering the same subject matter as the old. For this reason, care must be taken to distinguish those cases which state, either by decision or dicta, that certain treaty provisions are revived after hostilities cease. Thus, the cases of *Karnuth v. United States*, 279 U.S. 231[10] and *The Sophie Rickmers*, 45 F. (2d) 413, cannot be cited as authority for the proposition that certain treaty provisions continued in effect during the war. No federal case can be found where the court has held that a treaty continued in force *during* a state of hostilities between the contracting parties.[11]

In relying upon the dictum in *Techt v. Hughes, supra*, petitioner attempts to apply the test, upon

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[10]The *Karnuth case* held that war abrogated the Treaty of 1794 and by dictum only said that not *all* treaties were abrogated by war.

[11]Appellant inadvertently states that the rule that "war abrogates only those treaty provisions whose continued existence is incompatible with the state of hostilities" is the rule of "this Court" (Brief for Petitioner p. 8, Paragraph A.) That is the rule expressed in the New York Court in *Techt v. Hughes, supra*, and has never been adopted in this Court.

which that court rested its decision, namely that "provisions compatible with a state of hostilities" (229 N. Y. at 241) would be enforced, to the facts of this case, in which, as distinguished from the *Techt Case,* the rights of enemy aliens resident in enemy country are involved. The touchstone in appellant's view which serves both to preserve the alien's rights under the treaty, and yet serves to prevent his acquiring any property interest which he might use or enforce is the Trading with the Enemy Act (50 USCA App.), (Brief for Petitioner pp. 18-20.) Essentially, the argument of appellant concedes that the Treaty of 1923 could not be enforced now, that it would not have survived the war, if it were not that the existence of the Trading with the Enemy Act prevents the Treaty from having any practical, legal effect. It is not valid to urge that the Treaty persisted throughout the war simply because of the fortuitous existence of a statute which prevented any of the persons intended to be benefited thereunder from attaining any of the benefits. The federal statute, admittedly, was not enacted specifically to reach rights obtained through inheritance alone, but all manner of property rights. (Cf. footnote 5, page 19, supra.) The possibility that the federal statute may be repealed, or amended so as to exclude, specifically, rights obtained by inheritance, or that it may, in the discretion of the Custodian, be administered so as to exclude rights of inheritance (Brief for Petitioner, p. 19), would, in the event of a holding that such treaty provisions remain effective during a war, leave little in the way of "other

safeguards" (Brief for Petitioner, p. 17) to prevent the enrichment of alien enemies in hostile territory.

One difficulty of the appellant's argument is that it completely disregards the content of the words that are used. When he contends the treaty has not been abrogated or suspended and states: "The succession by a German to mere ownership of property in the United States could have offered no possibilities of impeding our military or economic mobilization", (Petitioner's Brief, p. 17) the "mere ownership" he is talking about is the bundle of rights given by the treaty. An examination of those rights discloses them to be fairly considerable, so considerable in fact that there must be "other safeguards" (Petitioner's Brief, p. 17) to prevent the Germans having the rights given by the treaty, from asserting them in a "way prejudicial to our national interest". (Petitioner's Brief, p. 17.) The "other safeguards" is of course the Trading with the Enemy Act. The need for the "safeguards" is a confession of the fact that the rights given by the treaty are not compatible with a state of hostilities.

2. The effect of the Trading with the Enemy Act upon the existence of the Treaty.

Article IV of the Treaty of 1923 with Germany is a war casualty in another respect than the effect of the war alone—The Trading with the Enemy Act (50 U.S.C. App.; 40 Stat. 411 as amended, 55 Stat. 838) is a federal statute, later in date, and in terms and effect so irreconcilable with and contrary to Article

IV that the latter must be regarded as inoperative since the date of the declaration of war against Germany.

The particular article of the Treaty in issue purports to guarantee to German nationals the right to have full power to dispose of their personal property of every kind in this country, and in respect to real property, to have a term of three years to take and sell the same "without restraint or interference" (See Appendix A, p. i.) The federal statute, on the other hand, from and after December 8, 1941 (before the death of decedent in this case) made it unlawful for any German national to enter the United States, to have any communication of a business nature here, to remove property or money from the United States, and it was unlawful for any national of the United States to have any dealings or communications with German nationals. In short, no money or property could be taken out of this country to Germany or for its nationals (Trading with the Enemy Act, Sects. 7 (c,d) and 5, as amended by First War Powers Act, 55 Stat. 839.) (See footnote 15, p. 54 infra.)

Appellant contends that none of the provisions of the federal statute is irreconcilable with the right of an alien to inherit property, asserting that neither entry into the country nor communication with persons in this country, nor withdrawal of the proceeds of inheritance is indispensable to any enemy heirs "succession to ownership". (Brief for Petitioner p.

19.) This fails to recognize, however, that the essential guaranty of the treaty itself is not that of a bare, dry legal title to property, but that of most of the fundamental incidents of title, namely the right to take, use, and dispose of the property. Under the express provisions of the federal statute none of these basic attributes of ownership accrues to the alien. Ownership is a word used to connote the rights, privileges, powers and immunities that one has in respect to something. From the standpoint of the Germans in this case it connotes the rights given them under the treaty. There is no such thing as ownership in a vacuum. The provision in the statute that the Custodian may license such taking does not enlarge the rights purportedly guaranteed to the alien under the treaty, but, instead, puts a condition thereon not contemplated by the treaty, and contrary to the purpose of the treaty. There is clearly an irreconcilable conflict between the rights of ownership purportedly granted by the Treaty, and the provisions of the Trading with the Enemy Act which nullify all of the incidents of such ownership. Ownership without incidents is nothing. (See: Fundamental Legal Conceptions, Hohfeld, Wesley N.: The Law and Mr. Smith, Max Radin.)

The Custodian's power to vest alien property cannot be reconciled with the grant of power by the Treaty to aliens to take. Both powers stem from the same source, namely the will of the federal govern-

ment to enforce them.[12] Appellant attempts to distinguish the two by pointing out that the *administrative* act of actual vesting may be delayed for some *period* of time after the death of the decedent, and therefore contends that while the rights of the alien accrue at the time of the decedent's death, the vesting order must take effect at some future time. Brief for Petitioner, p. 20.) While it is true that the vesting order may be made at some time after the death of the decedent, the rights and powers of the Custodian accrue at the same instant that the rights of the heir, be he alien or American, accrue, namely the instant of the death of the decedent. This has always been the law.

Thus, in the leading case of *Miller v. Rouse* (S.D. N.Y. 1921) 276 F. 715, the Custodian had petitioned to compel summary payment by the executors of Callman Rouse of certain claims alleged to be due to Ruth Marcuse, formerly an alien enemy. One of these claims was for $4500 and was granted, as being a debt owed to Ruth Marcuse. As to the demand for $10,000, which was found to be a legacy, Judge Learned Hand said (276 F. at 716):

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[12]Appellant's contention (Brief for Petitioner, p. 19) that the power to vest does not conflict with an alien's right to inherit because the Custodian merely possesses "authority" to vest and not a "mandatory" duty, raises dereliction of duty on the part of an administrative official to the dignity of a constitutional principle. Failure of the Custodian to vest the property interest of an enemy alien resident in a hostile country should most certainly lead to the appointment of a new officer, rather than endowing the alien with any new right.

"To the legacy of $10,000 different considerations apply. The other demand * * * determined that the alien, Ruth Marcuse, had 'a certain right, title, and interest as a beneficiary under the will of Callman Rouse', and thus was duly demanded, the demand operating as a capture. * * * *However, this capture did no more than substitute the Custodian in the place of the beneficiary;* it did not profess to determine what her rights were as such, and in the absence of such determination there is no specified fund or obligation on which the capture can operate. *The capture has put the Custodian in the place of Ruth Marcuse, but he must work out his rights in accordance with the determination; he becomes entitled to all rights which she had as beneficiary under the will of Callman Rouse and no more.* * * * No summary demand can go on that demand; *the Custodian is merely a legatee under the will.*" (Emphasis added.)

Accord: *Kahn v. Garvin* (S.D. N.Y. 1920) 263 F. 909.

Further, appellant's argument that the Custodian's vesting order operates only as of the time of its issuance, and that the Custodian secures his rights as of that time while contrary to the settled law, as illustrated by the two cases above, is also contrary to a position taken by the Custodian in a recent case. Thus, in *In re Nossen's Estate,* (Mont.) 162 P. (2d) 216 (1945), the decedent died in 1935 leaving six heirs, five of whom were nationals of Germany, resident therein. No distribution of the estate was sought

until after the war started. In 1939, however, Montana had enacted a reciprocal inheritance statute very similar to the California statute in issue (Section 2, Ch. 104, Laws of Montana (1939); see Appendix C., p. x), but which provided for escheat of the interests of the foreign heirs, reciprocity not existing, rather than the local heir taking the entire estate, as the California statute provides. The Custodian vested the interests of the German heirs after the war started, contending that his *right* to take vested at the same instant that the right of the German heirs vested; the Attorney-General, for the State of Montana, attempted to advance the theory here espoused by the Custodian, namely that the latter's right dates only from his vesting order and that, hence, the Custodian must establish his right under the reciprocal inheritance statute. The court held that the Custodian was correct, and that his right to vest bore no relation to the time he issued his order, that since this right vested in 1935, on the date of the death of the decedent, the reciprocal inheritance rights statute did not govern the case.

In the case of inheritance rights based on the treaty, the right of the alien and the right of the Custodian are in complete variance. The right of the Custodian to take must depend upon the right of the alien to take; but since the right of the alien to take in this case depends upon a treaty, and since the power of the Custodian is granted in a subsequent federal statute which in terms and principle denies the rights

granted by the treaty, on what basis can the alien now claim any right? The right of the alien to take does not depend on any action taken by the Custodian, as the Trading with the Enemy Act does not purport to create any property rights. The fundamental issue is the basis of the alien's claim to a property right, and that is to be found in the treaty alone. The statute forbids the alien to exercise any of the rights granted by the treaty. The statute is a denial of rights in the alien, and was promulgated by one of the parties to the treaty.

It is, thus, impossible, to avoid the conflict between the treaty and the federal statute—there is not, either in fact or theory, any lapse of time between the accrual of a right in an enemy alien and the accrual of the right to vest in the Custodian. The right of the federal government to take rests upon a claim of power which, in theory and effect, denies the right of an alien to take, pursuant to a former grant of power by the federal government and must be held to have abrogated the first grant of power.

The mere possibilty that part or all of the property thus vested and taken may, ultimately, be returned to the alien does not alter the essential nature of the original taking. This taking is in the nature of a confiscation.

United States v. Securities Corporation General (Ct. App. D.C. 1925) 4 F. (2d) 619;

Cummings v. Deutsche Bank, 300 U. S. 115 (1936).

See:

"Enemy Property", 11 *Law and Contemporary Problems* (1945) pp. 79, 142.

Any return of the property seized would not be the confirmation of any right in the aliens, but a mere matter of grace to the vanquished.

Cummings v. Deutsche Bank, supra.

See:

United States v. White Dental Co., 274 U. S. 398, at pp. 402, 403.

It is well settled by decisions in the federal courts and in this court that in the event of a conflict between a treaty and a statute of Congress the one later in date must prevail.

Taylor v. Morton, 2 Curtis, 454 (Cir. Ct. D. Mass. 1855), Fed. Cas. No. 13,799;

In re Clinton Bridge, 1 Wool. 150 (Cir. Ct. D. Ia. 1867), Fed. Cas. No. 2900;

The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870);

Ropes v. Clinch, 8 Blatch. 304 (Cir. Ct. S.D. N.Y. 1871), Fed. Cas. No. 12,041;

Hijo v. United States, 194 U.S. 315, 324 (1903);

Fong Yue Ting v. United States, 149 U.S. 698 (1892);

Rainey v. United States, 232 U.S. 310 (1913);

George E. Warren Corp. v. United States (CCA 2, 1938), 94 F. (2d) 597;

Chinese Exclusion Case, 130 U.S. 581;

Whitney v. Robertson, 124 U.S. 190;

The Head Money Cases, 112 U.S. 580.

The language of Justice Curtis in *Taylor v. Morton*, supra, the leading case for this doctrine, is particularly cogent (Fed. Case No. 13,799, at p. 785):

> "If the act of Congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just interpretation of the treaty, or an accurate knowledge of the facts of likeness or unlikeness of the articles [of trade items involved], or whether it was an accidental or purposed departure from the treaty; and if the latter, whether the reasons for that departure are such as commend themselves to the just judgment of mankind. It is sufficient that the law is so written. * * *"

And, in *Ropes v. Clinch*, supra, Fed. Case No. 12,041, at page 1174, Justice Woodruff, as to the absence of an expressed intention in the statute to modify the treaty, had this to say:

> "So, they (Congress) may render it (the treaty) inoperative by legislation in contradiction of its terms, without formal allusion at all to the treaty; and generally, they may legislate as if no such treaty existed, in modification or alteration of what, by force of the treaty, has been the law heretofore, thus modifying the law of the land."

Both on authority and in theory no other rule is practical or possible. What prerogative does the court have to choose between a prior treaty and a subsequent, conflicting statute?

Rainey v. United States, 232 U.S. 310, 316 (1913).

Since, for the court, both have the equal force of law, the court must treat the situation as the same created by two conflicting statutes, of which the one later in time prevails. Any embarassment, which may result from such action, as to our foreign relations, is a problem to be met by the political department of the government.

The Cherokee Tobacco, supra, at p. 621.

Petitioner cites two cases as authority that a treaty will not be deemed to have been abrogated by a later statute unless an intention to abrogate has been clearly shown.

Cook v. United States, 288 U.S. 102; and
Chew Heong v. United States, 112 U.S. 536.

The latter case is not in point, as the court simply construed the statute so that it did not conflict with the earlier treaty. The decision in the *Chew Heong Case* is that the court will try to avoid an interpretation of a statute enacted in 1882 which would, if otherwise interpreted, conflict with a treaty recently concluded, in 1880. *Cook v. United States,* supra, involved a situation which differs materially from that now before this court. The issue before the court involved the legality of the seizure of a British ship carrying contraband liquor at a point 11½ miles off our coast. Section 581 of the Tariff Act of 1922 gave jurisdiction to our revenue cutters up to four leagues (12 miles). The Treaty of 1924 with Great Britain, however, limited our jurisdiction as to British ships to a point one hour's sailing time from shore, which might be more or less but in the instant case was less

than that provided in the statute. In 1930, the Tariff Act was reenacted, with changes in other sections, but without changing Section 581, relating to the 12 mile limit. The question before the court, on this issue, was whether this reenactment modified the treaty. The court held that it did not, citing the *Chew Heong Case* and *United States v. Payne,* 264 U.S. 446. A primary factor in the court's decision was the fact that the department charged with enforcement of the Tariff Act had, even subsequent to the reenactment of the section in issue, instructed its officers to continue to follow the treaty. The decision of the court is very probably based on the notion that Congress had been guilty of an inadvertence in not changing the section to conform to the exception in favor of the British when the entire act was reenacted; the department of the government concerned with enforcement of the act had so assumed in issuing its regulations.

The letter from the Department of State, cited in appellant's brief (Brief for Petitioner, p. 25, pp. 85-92) as authority that the political branch of the federal government considers Article IV of the treaty to be still in effect, is based largely on the judicial reasoning found in the court decisions discussed therein. It discusses none of the political elements relative to the inconsistency between the Trading with the Enemy Act and the continued existence of Article IV of the Treaty, nor does it advert to the problem raised by the collapse of the German state.

Thus, it has been suggested that *Karnuth v. United States*, 279 U.S. 231 (1929), cited in the above letter (Brief for Petitioner, pp. 86, 87), and which case held that certain provisions relative to immigration in the Jay Treaty with Great Britain had been abrogated by the War of 1812, might well have rested on the fact that, in 1927, the government found the privileges granted by this Treaty provision to be inconsistent with its immigration policy.

38 *Yale Law Journal*, 1150.

In other words, the political department, namely, Congress, acting through the immigration regulations, which were inconsistent with the treaty, had taken *action*, and the latter was held to nullify the Treaty. This is the essential effect of the case. And this is essentially respondent's position—that the political department has already *acted* in respect to the continued existence of Article IV by the Trading with the Enemy Act as amended which, by its conflict with the Treaty, must be held to have voided its provisions.

The Acting Secretary of State concludes the letter (Brief for Petitioner, p. 92) with the supposition that, since *Techt v. Hughes* had already been decided prior to the Treaty of 1923, the framers thereof had this case in mind and could have added a provision nullifying the effect of this case on Article IV, if they had so desired. However, the *Techt* case was decided in 1920, after the cessation of hostilities and before the consummation of the Treaty of Versailles. Article 289 of the Versailles Treaty (Carnegie Endow. for Int. Peace, *The Treaties of Peace*, p. 168; see p. 25,

fn. 7, supra) which article was subscribed to by the United States under the later Treaty of Berlin (42 Stat. 1939, 1943), provided that each victorious power might revive treaties with Germany by giving notice within six months. This latter provision is *action* by our political department, which shows that the treaties were considered at least suspended during the war; and the court in the *Techt* case, therefore, had indulged in a rather violent presumption in assuming that the treaty in question had persisted through the war.[13]

The letter of the Department of State (Brief for Petitioner, pp. 85-92) is not determinative of this issue. It is a mere, gratuitous expression of an opinion by an Under Secretary of State in the capacity of Acting Secretary of State, in reference to a matter not before the department for decision or action, and upon which the action of no other governmental agency was predicated; it is decisive of nothing. In

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[13]Further, it is interesting to note, in considering the feasibility of proceeding on such presumptions in the face of inconsistent conduct by the political branch of the government, that *State v. Reardon*, 120 Kans. 614 (1926) (cited in Brief for Petitioner p. 90) held that a similar provision in the Treaty of 1828 with Prussia (8 Stat. 378) had survived the war, and relied entirely on the *Techt* case. Subsequently, in a letter to the Harvard Law Review, the then Under Secretary of State revealed that the government did not consider that treaty to be in existence—

> "This Government considered the matter and it was not deemed advisable to give notice within the period referred to in Article 289, as extended by paragraph 5 of Article II of the Treaty (of Berlin) • • •, of its intention to revive the Treaty of 1828 between the United States and Prussia. In the circumstances, the Department does not consider that the Treaty of 1828 was effective in 1924 • • •" (40 Harvard Law Review 752, fn. 29).

contrast, it is worthy of note that in January of 1940, California Attorney-General Earl Warren requested the Honorable Cordell Hull, then Secretary of State, to render an opinion relative to this same question in respect to the Treaty here in issue; and the Attorney-General reported that

> "He (Secretary Hull) states that the question as to the effect of war upon the operation of those treaties is one upon which his Department has not taken any definite position, and that it would appear to be one which judicial tribunals may decide."
>
> Opinion of Attorney General, Letter to Hon. Harry B. Riley, State Controller, July 15, 1942, p. 11-NS4451.

The letter cited and quoted by appellant does not bind the political department of the government to any course of action in respect to the Treaty, nor does it profess to be more than a discussion and review of *judicial* decisions bearing on the problem. Even if the letter had expressed an opinion based on political considerations, such as have been outlined here, it is doubtful whether it would have shown a "*decision* of the political department", which is the aid the courts should seek on this issue.

See: Note, 28 Mich. L. Rev. 318, footnote thereto.

It would seem, then, that there is a direct and inexorable conflict between Article IV of the Treaty of 1923 with Germany, and the Trading with the Enemy Act, as amended by the First War Powers Act of

1941. In view of this conflict, and with an appreciation of the circumstances in which the conflicting statute was enacted, the court can only hold that the intention of Congress to abrogate the rights granted by the Treaty was clearly manifested. Once petitioner admits the comprehensiveness intended in the Trading with the Enemy Act (Brief for Petitioner, p. 23) it is not particularly remarkable that it reached into fields not originally anticipated by Congress. In theory and fact, the federal statute operates to void the basis of any rights in enemy aliens, namely the Treaty, and in the field of inheritance the only rights the aliens can claim are based on the Treaty—when these are taken away nothing remains—either of the rights or the Treaty.

3. The effect of the collapse of the German State, and the cessation of its existence as an international personality.

On a third basis, the Treaty of 1923 with Germany must be held to have failed to survive the war. Germany, as a result of the hostilities, has ceased to exist as an independent, national or international community. There is, in the geographical area which once comprised this entity, no central government of any sort, and only a very limited form of local government, all of which is closely supervised by the conquering military authorities. The country no longer exists as a single political entity, but has been divided into several areas of control. There is, further, no present guarantee that the German State will ever again exist as an independent, international

personality. These are facts of common knowledge, and of which this court may take notice. Further evidence, however, of this state of affairs lies in the pronouncement of the victorious powers, which characterize the complete collapse of the German State and the entire lack of any national, responsible government.

> "There is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers".
>
> Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Department of State Publication 2423, p. 62.

> "* * * The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings, or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nation without the sanction of the Allied Representatives." Agreement between Governments of the United Kingdom, United States of America, and USSR, and the Provisional Government of the French Republic, made in Berlin, Sept. 20, 1945. *The Axis in Defeat*. Department of State Publication 2423, p. 72.

The practical effect of this state of affairs upon the continued existence of the Treaty is simple and clear. Treaties are essentially contractual, bilateral in na-

ture, requiring the continued mutual consent, existence, and ability to perform on the part of both of the High Contracting Parties thereto.

> "Treaties are consensual in their nature; the obligations of its predecessor are deemed to be accepted by the successor state." *The Sophie Rickmers*, 45 F. (2d) 413, 417.

The inability, then, of one of the parties to the Treaty to continue performance, under the Treaty itself, must put a period to the existence of this international contract.[14]

The effect of the extinction of state life upon the existence of the treaties to which the erstwhile political entity had been a party is not a new question in international law. There is, moreover, universal agreement among the text authorities that the effect of such an occurrence is to end the treaties entirely.

> "Whether coercive or voluntary, the extinction of the state as an international person puts an end to its own international rights and obligations. All treaties concluded by it become as legal contracts null and void. All its rights at international law cease to be enforcible in its own name: none of its obligations can be pressed against it

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[14]The International Commission of Jurists, meeting in Rio de Janeiro in 1927, adopted the following, proposed doctrine relating to the expiration of treaties:

Article 14, Project IV.

A treaty ceases to be effective:

. . . . . .

(c) When a condition rendering it void has happened.

. . . . . .

(g) When it becomes incapable of execution.

Cited in 22 *Am. Jnl. of Int. Law, Spec. Supp.*, p. 245.

as a legal person. Its former rights must henceforth be asserted, if at all, and its obligations must be met, if at all, by the state which has absorbed it." Fenwick, *International Law* (1934), p. 121; see also Wilson, *Handbook of International Law* (1939), p. 221; Halleck, *International Law*, Sect. 35, Chapt. 18; Wheaton, *Elements of International Law*, Sect. 275; McNair, *Law of Treaties* (1938), p. 389.

Among the examples of such extinction of state life which resulted in the termination of the treaties to which the country had been a party, are Poland in 1795, Transvaal in 1901, Korea in 1910, Texas in 1845, Montenegro in 1919, and the division of Columbia in 1829-1830.

The policy of our own government has, from the very first, been in substantial agreement with the rule above expressed, and have adhered to it both when this country was in the position of the annexing or absorbing power (Texas, Hawaiian Kingdom), and when some other power applied it to annexations affecting the foreign relations of this country (see Hyde, *International Law* (1922), Sect. 543). In the history of the relations of the Netherlands to the United States there is an interesting case in point, involving the existence of the Treaty of 1782 (8 Stat. 32) between the United States and the Netherlands. In 1793 war broke out between France and the United Provinces of the Netherlands; in 1795 the Stadtholder was driven out, and the Kingdom of Holland was formed as part of the French Empire; in 1814, at the

Congress of Vienna, the Kingdom of The Netherlands was formed. As to the effect of those developments, the Dutch foreign minister maintained that from 1795 to 1814 "the political existence of Holland was then terminated", that "Holland had ceased for a long time to form an independent state". To this contention the United States agreed and acquiesced in Holland's theory that the Treaty of 1782 had not survived. (Summarized in Davis's *Treaty Notes*, Treaty Volume (1776-1887), p. 1235; also in V Moore, *Digest of International Law*, pp. 344-5.)

The law and the practice of nations in the face of this question was brought into issue at the time of the American annexation of the Hawaiian Kingdom. The policy of our government, and the rule of international law which governs, was most clearly expressed by Secretary of State Sherman in a letter to the Japanese Minister at Washington in respect to this annexation:

> "* * * the history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover, into the Prussian kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution ex-

tinguished the treaties of the independent Republic of Texas * * *" 2 Hyde, *International Law* (1922), Sect. 543; V Moore, *Digest of International Law*, p. 349.

This issue has never been clearly presented to any American court. Those cases which arose out of the problems attendant upon the formation of the German Empire in 1871 and the effect of this upon the treaties which this country had previously concluded with the individual states of that Empire are distinguishable and are largely inconclusive of this question. In the first place, the German Empire was formed by the *voluntary* adhesion of the member states, each of which relinquished only a portion of its sovereignty; and, further, both the Imperial German Government and our State Department agreed to honor and enforce the treaties which had been concluded between this country and the member states of the Empire,—in effect a new treaty arrangement was made. These facts, to which the court adverted, clearly distinguish the case of *Terlinden v. Ames*, 184 U.S. 270 (1901), from the instant case. (Cf. *In re Strobel's Estate*, 39 N.Y.S. 169.) Petitioner cites the *Terlinden* case (Brief for Petitioner, p. 24, fn. 6) as authority for the proposition that the continued power of a state to perform its treaty obligations is a political question for the political departments to decide. That proposition is undoubtedly true when the parties to the Treaty are either both still *in esse* (cf. *Charlton v. Kelly*, 229 U.S. 447) or there has been a successor state to which one has voluntarily assigned the con-

duct of its foreign affairs (*Terlinden v. Ames*, supra) so that the question is really not one of *power* or *ability* to perform, but whether the other party is willing to perform; in other words, when it is a question of *violation* of a Treaty which is raised in court, that is a question, clearly, for the political department of the government to meet. In the instant case, the question before the court is purely within the judicial province: is there another, presently existing party to the Treaty of 1923 which has the power to perform its stipulation? The answer is clear and the effect of that answer is clear: one party to the treaty has become extinct; and, as a result, the treaty cannot exist.

In the instant case there is no successor state to which the obligation of reciprocity can fall. There has been a complete lapse in the existence of a responsible national government of Germany, brought about by a devastating military defeat. The failure of the Treaty of 1923 due to this collapse of one of the contracting parties, and the lack of a successor state, leaves the Custodian without a cause of action. (*The Schooner Peggy*, 1 Cranch. 103.)

B. ARTICLE IV OF THE TREATY OF 1923 DOES NOT GOVERN SUCCESSION BY GERMAN NATIONALS TO PERSONALTY OF DECEDENT AMERICANS.

The second paragraph of Article IV of the Treaty of 1923 with Germany is concerned with reciprocal rights of inheritance of personal property, and reads as follows:

> "Nationals of either High Contracting Party may have full power to dispose of their personal prop-

erty of every kind within the territories of the other, by testament, donation or otherwise, and their heirs, legatees and donees of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases".

In language, it is quite clear that this provision does not guarantee reciprocity of rights of inheritance in those cases where the decedent is a national of the country of his death, and the legatees are nationals of the other contracting party. Appellant argues that the two clauses of the first sentence of this paragraph were intended to, each, fulfill a separate purpose—the first clause to provide for the disposal, by Germans, of their property in the United States, and the second clause to ensure that Germans would succeed to personalty left by Americans, decedent in the United States. Initially, by a process of dissection of the clauses and their relation to each other, appellant attempts to show, aided by judicious transposition of words and phrases (Brief for Petitioner p. 36) that the two clauses guarantee reciprocity of inheritance rights regardless of the nationality of the decedent.

In addition, appellant devotes some 35 pages of his brief (Brief for Petitioner, pp. 32-67) to the development of the historical background of Treaty clauses

similar in tenor to the one in issue, in an effort to demonstrate that, originally, the parties to such Treaties intended to create reciprocity of inheritance of personalty regardless of the nationality of the decedent.

On the face of the Treaty itself, it is difficult to escape the conclusion that, applying a purely objective test, such as might prevail if the issue were as to a contract between private parties, the oaths of twenty bishops would not prevail to establish that the parties to the Treaty had provided for reciprocity in every case. Thus, reading the paragraph in a straightforward manner, it provides that "Nationals of either High Contracting Party may have full power to dispose * * * within the territories of the other * * * and their heirs * * * wherever resident * * * shall succeed * * *". In absence of a patent ambiguity on the face of the Treaty it would appear that the parties had provided for reciprocity only where the decedent was a national of the country other than the one in which his death occurred, and that they had intended to protect the estates of their own nationals who died in the other country.

The most respectable case authority is in accord with this view. In *Frederickson v. Louisiana*, 23 How. 445, Article III of the Treaty of 1844 with Wurtemberg (8 Stat. 588, 590), which was identical with the article presently at issue, came before this Court. A Louisiana statute, Sec. 7, Act 315, 1855, Acts La. pp. 398, 399) provided for a succession tax of 10 per cent on legatees not domiciled in the United

States. This Court affirmed the decision of the Louisiana court and held that this statute did not discriminate between aliens and citizens because it taxed all legatees domiciled abroad without regard to their citizenship. The Treaty was held to be no obstacle to the tax because since the decedent in the case was an American, the Treaty did not apply. Accord: *Moody v. Hagen,* 36 N.D. 471 (1917) affirmed *per curiam* under the title *Skarderud v. Tax Commission,* 245 U.S. 633 (1917) (Article XVII, Treaty of 1827 with Norway, 8 Stat. 346, 354); *Peterson v. Iowa,* 245 U.S. 170 (1917) (Article VII, Treaty of 1826 with Denmark, 8 Stat. 340, 342); *Duus v. Brown,* 245 U.S. 176 (1917) (Article VI, Treaty of 1783 with Sweden, 8 Stat. 346, 354).

Petitioner's fundamental thesis is that this Court in the *Frederickson* case, supra, was not made aware of the historical background of such clauses, and that the decision, and the cases which followed it in 1917, were in error. Assuming that petitioner's development of the historical background is sound, it is difficult to explain why the treaty-makers, in 1923 for example, failed to take steps to rectify the error by a suitable modification of the language of this particular provision. It would seem, further, that a decision of this Court in 1860, and followed again in 1917, had so established a rule of law that a failure on the part of those concerned with the drafting of treaties to modify them to avoid that rule must be taken as acquiescence in that rule.

There is no ambiguity on the face of the treaty, and hence no apparent reason for resorting to extrinsic evidence to derive the intent of the parties thereto. This view is further strengthened by the rule of the *Frederickson* case in 1860 and the fact that no effort was made by the draftsman of the Treaty of 1923 to avoid that rule. The parties must be presumed to have intended to protect only the estates of Germans dying in the United States. Since the decedent in this case is assumed to have been an American (Brief for Petitioner pp. 10, 29), it is apparent that this treaty does not govern the transfer of the personalty in her estate.

II. THE CALIFORNIA STATUTE IS VALID, APART FROM THE TREATY, AND DOES NOT INVADE THE FEDERAL FIELD OF CONTROL OVER FOREIGN RELATIONS.

The effect of the California statute, in either its original or its amended form,[15] is to grant to aliens a

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[15]Appellant assumes, in his argument on this issue (Brief for Petitioner, p. 68, fn. 46) that the amended statute only applies to this case (see pp. 69-74 infra), contending that the original statute of 1941 is invalid for additional reasons. These additional reasons were that the 1941 form of the California statute not only required reciprocity, but also proof of the right of American citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir (Ch. 895, Calif. Statutes, 1941). This condition is, appellant alleges, invalid as a regulation of foreign commerce. The Treaty itself, however, provides, in addition to reciprocity, that there is to be the additional right to "withdraw the proceeds thereof, without restraint or interference" and, as to personalty, that the successors in interest "may take possession thereof" (44 Stat. 2135). The 1941 California statute merely reiterates the requirements of the Treaty itself. This requirement facilitates foreign

right to inherit property in California if a reciprocal right in favor of American citizens exists in the alien's country. This statute is characterized by appellant as invalid, as an invasion of the field of foreign relations exclusively reserved to the federal government. (Brief for Petitioner, pp. 68-75.) The issue thus raised is more important in its broad implications, than for

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commerce, if the acquisition of interests in foreign estates be such (Cf. *Mayer v. Grima*, 49 U.S. 490), and is to be contrasted with the factual situation in *Henderson v. Mayor of N.Y.*, 92 U.S. 259; *Chy Lung v. Freeman*, 92 U.S. 275, and *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, in which the state regulations were a direct impediment to the free flow of incoming foreign commerce and peoples.

If, by this contention, appellant is conceding that the Treaty no longer guarantees that American citizens have the right to "withdraw the proceeds" of foreign estates, nor to "take possession" of personalty, then appellant is conceding that the T aty is no longer operative:

"* * * In every international treaty a resolutive condition is always implied in cases where the essential conditions of the treaty can no longer be carried out by one of the contracting parties. Under the Hague Treaty (July 17, 1905) aliens are only exempted from giving security for costs when the recovery of sums which the plaintiff may be ordered to pay is practicable. On account of the present economic relations between France and Italy, arising out of the application of the sanctions imposed by the League of Nations, the Italian Government has just forbidden for an indefinite period all export of capital. It is notorious that debts owed by Italians to aliens are compulsorily paid into blocked accounts, and that the foreign creditors cannot dispose of the sums paid into their accounts unless they can prove that they are to be used again in Italy. * * * This prohibition of the export of capital by Italians makes it not only impossible for a French national to recover sums due to him from an Italian subject, but also makes it impossible for an Italian to pay his debts abroad. Under the circumstances, this prohibition stands in the way of the provisions of the Hague Treaty". *Bertacco v. Bancel et Scholtus*, CB *Revue Critique de droit international* (1937) 95, 96-97, translation: *Annual Digest*, 1935-37, Case No. 201, cited in Hackworth, *Digest of International Law* (1943), V, p. 299.

its possible effect in this case.[16] The entire question of implied limitations upon state power arising from constitutional grants of power to the federal government is one that is largely unsettled; it is possible, however, to adduce from the decisions of this court certain large areas of permissible governmental action, upon the part of either state or federal government, *which are valid* even though there is an incidental effect which touches upon the other's field.

The states have the exclusive power to regulate the right of inheritance, succession and testamentary disposition of all property within their borders.

> "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U. S. 556, 562 (1941); Accord: *Mager v. Grima*, 49 U. S. 490; *Lyeth v. Hoey*, 305 U. S. 188; *Demorest v. City Bank Co.*, 321 U. S. 36; *Maxwell v. Bugbee*, 250 U. S. 525.

The power of a state to regulate rights of inheritance includes the power to deny, absolutely, to all aliens any right to inherit, and this is conceded by appellant (Brief for Petitioner, p. 71), *Terrace v. Thompson*, 263 U. S. 197. Conversely, by virtue of this inherent

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[16]The decision of this Court that the California statute is unconstitutional if coupled with a holding that the Treaty of 1923 no longer exists, would still leave the Custodian's right to take open to serious question, since the right of the aliens would have to be derived from the effect of the Trading with the Enemy Act in conjunction with Sections 27 and 1026 of the California Probate Code. Section 27, California Probate Code permits testamentary disposition only to "persons capable by law of taking the property".

power to regulate rights of succession and testamentary disposition, the state has the power to grant to all aliens an absolute, unlimited right to inherit property within its borders. In *Blythe v. Hinckley*, 180 U. S. 333 (1900), it was contended that such a grant of rights to aliens by state statute was, in the absence of a treaty on the subject, violative of Section 10, Article I of the Constitution of the United States, forbidding states from concluding treaties. This court characterized this contention as "extraordinary", and upheld the statute.

No less extraordinary is the assertion of appellant in the instant case that the granting, by the state, of a limited or conditional right of inheritance to aliens is, apart from any question of treaties, invalid and unconstitutional as an invasion of the federal control over foreign affairs. It is appellant's argument that the defect in the California statute lies in conditioning the alien's right to inherit on the extension of a similar privilege to American citizens by the alien's country. This condition he terms an "invitation" to foreign states to "trade" inheritance rights abroad for inheritance rights in California; and that, therefore, the statute attempts to duplicate the treaty making program of the federal government and is invalid as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights.

The California statute is not an isolated instance of state legislation in these terms. (See Appendices B and C, pp. vi-xiv.) Besides California, eight other states now have statutes conditioning rights of

inheritance of aliens on reciprocity.[17] Of these eight statutes, three antedate the California statute by a great many years.[18] The existence of these particular

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[17] *Arizona*, Sec. 39-111, 3 Ariz. Code Annot. (1939); *Montana*, Sect. 2 Ch. 104, Laws of Montana (1939); *Nevada*, Sects. 9894, 9894.01, 9894.02, 2 Nev. Comp. Laws Supp. 1931-1941; *Oklahoma*, Title 60, Sect. 121, Okl. Stats. Ann. Perm. Ed. (cf Title 84, Sect. 229, Okl. Stats. 1941); *Oregon*, Sect. 61-107; 5 Ore. Comp. Laws Annot. (1940); *Texas*, Articles 167, 177, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1935); *Connecticut*, Sect. 5055, 2 Gen. Stats. Conn. (1930 Rev.); *Louisiana*, Article 1490, Civil Code (enacted 1825). These statutes are set forth in Appendix C, pp. x-xiv.

The history of such legislation in the State of New York is interesting, and indicative of the various facets of valid state policy on this question. Thus, prior to 1893, aliens were under the full common law disability as to rights in property in New York. In 1893, this disability was removed and aliens were given full rights, under conditions not here material (Ch. 207, p. 365, L. 1893). In 1897, this was modified to impose the requirement of reciprocity—the citizen of any other country that allowed the citizens of the State of New York to take, hold, and transfer real estate were given similar privileges in New York—(Ch. 593, p. 706, L. 1897). See: *Haley v. Sheridan*, 94 N.Y.S. 864 (1905). This rule of comity and reciprocity prevailed in New York until 1913, when Sect. 10, Subdiv. 2 of the Real Property Law (Ch. 152, 153, L. 1913) repealed the law of 1897 and provided that "alien friends" could take real property under the same rights as citizens. It was under this statute that *Techt v. Hughes*, supra, was decided. In 1944, this statute was amended to remove the limitation as to "alien friends", and now provides that all aliens may take real property in the same manner as native-born citizens. (See Sect. 10, Subdiv. 2, Real Property Law, 49 McKinney's Consol. Laws of N.Y. Annot. p. 11). The Code Commissioner's Note to this latest amendment to the New York law states that the amendment was designed to give control of property of aliens to the Alien Property Custodian. It is to be noted, then, that in this enactment is recognized the power of the state to *create* property rights in aliens, and then to create, *ipso facto*, a right to take the same in the Custodian.

[18] *Connecticut*, supra, note 17, enacted in 1918; *Texas*, supra, note 17, enacted in 1854; and *Louisiana*, Article 1490, Civil Code enacted as Article 1477 of the Civil Code of 1825. See: *Duke of Richmond v. Milne's Executors*, 17 La. 312, 36 Am. Dec. 613 (1841) in which this statute was applied and construed as between the laws of Scotland and Louisiana. The Louisiana statute was derived from the Code Napoleon of 1804.

statutes, especially the three mentioned in footnote 18, p. 58, and the further fact that very state of the union has some form of statutory enactment dealing with aliens' rights of inheritance (see Appendix B, pp. vi-ix, is a forceful indication that, traditionally, it had never been considered that any constitutional limitations whatever existed as to the power of the states to deny, grant, or condition the right of aliens to inherit.

Irving Trust Co. v. Day, supra;
Blythe v. Hinckley, supra.

The area of possible state action for any purpose does not include power to negotiate directly with foreign states.

United States v. Curtiss-Wright Corp., 299 U. S. 304.

It must be considered a novel, and startling, doctrine, however, to urge, as appellant has, that state action within a sphere uniquely and exclusively under state jurisdiction, and which action does not conflict with nor hinder federal action or policy in the field in question, namely, foreign affairs, is invalid merely because that state action has some incidental or indirect effect in foreign countries.[18] The question

[18]It is difficult to conceive of any state statute which does not, or could not have some indirect effect in foreign countries and hence upon our foreign relations. The effect of state workmen's compensation laws is a matter of deep concern to foreign countries, as the rights of foreign beneficiaries of American working men is an important part of the work of foreign consuls in this country. Also, state statutes regulating the hours of labor of women in industry has an indirect effect on foreign affairs as it enables cheap foreign labor to obtain a competitive advantage. This leads to the passage

here involved is to be distinguished from that wherein there is a conflict, either in principle, policy or essential details, between state action and federal action in a field in which both governments have the power to act. Where such occurs, the federal power must prevail. *Hines v. Davidowitz*, 312 U. S. 52. Here, in the instant case, no such conflict is found.

An argument very similar to that made by the Custodian here was made in *Mager v. Grima*, supra, where a state statute taxing the legacy of an alien at a higher rate than that of a citizen was in question. There the alien argued that since the proceeds of the legacy were sent out of the country the tax was a tax on exports and the matter was therefore within the exclusive province of the federal government. In passing on this argument the court said (8 Howard 490, at p. 494):

> "We can see no objection to such a tax, whether imposed on citizen and alien alike, or upon the latter exclusively. It certainly has no concern

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of tariff acts by the federal government, and ultimately to negotiations for reciprocal trade agreements.

The operation of state statutes which express some state policy which, though valid, is not uniform throughout the United States, also has some effect in foreign countries. Thus, suppose a resident of California dies, leaving only community property. In his will he bequeaths a dollar to his wife, also resident of California, and the residuum to his parents, nationals of and resident in Italy. The wife invokes the provisions of California Probate Code, Section 201, and elects to take her community property interest rather than under the will (See: *Estate of McCarthy*, 127 Cal. App. 80). This election which would have the effect, under California law, of depriving the Italian legatees of half of their bequest, certainly has an effect in a foreign country. The validity of the law is beyond question, however.

with commerce, or with imports or exports. It has been suggested, indeed, in the argument, that, as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the tax was therefore a tax on exports. But if that argument were sound, no property would be liable to be taxed in a state, when the owner intended to convert it into money and send it abroad."

The Court also stated (8 Howard, at pp. 493-494):

"Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that the property so descending or bequeathed shall belong to the state. In many of the states of the Union at this day, real property devised to an alien is liable to escheat. *And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.*" (Emphasis added.)

In delineating the areas of permissible action, for both state and federal governments, within the limits of reciprocal constitutional guarantees of and inhibitions on the exercise of governmental power, a familiar doctrine is encountered, namely, that the exercise of a governmental power, which is otherwise clearly valid, will not be struck down merely because of some incidental effect beyond the direct power of the enacting government.

In re Kollock, 165 U. S. 526, 536 (1896):

Veazie Bank v. Fenno, 8 Wall. 533;
McCray v. United States, 195 U. S. 27;
Sonzinsky v. United States, 300 U. S. 506;
A. Couthoui, Inc. v. United States, 54 F. (2d) 158, cert. den. 285 U. S. 548;
United States v. Doremus, 249 U. S. 86;
Nigro v. United States, 276 U. S. 332;
Chas. C. Steward Mach. Co. v. Davis, 301 U. S. 548;
Helvering v. Davis, 301 U. S. 619;
Missouri v. Holland, 252 U. S. 416;
Florida v. Mellon, 273 U. S. 12.

While these decisions illustrate the power of the federal government to act within the scope of its delegated powers, despite a resultant, incidental effect upon fields of power reserved to the states, the principle is equally applicable to state power.

Gilbert v. Minnesota, 254 U. S. 325;
Kelly v. Washington, 302 U. S. 1, 10;
Halter v. Nebraska, 205 U. S. 34;
Reid v. Colorado, 187 U. S. 137;
Carey v. South Dakota, 250 U. S. 118;
Dickson v. Uhlmann Grain Co., 288 U. S. 188;
Mintz v. Baldwin, 289 U. S. 346;
Maurer v. Hamilton, 309 U. S. 598, 614;
Savage v. Jones, 225 U. S. 501.

The doctrine of federal supremacy naturally extends to federal action an inherently greater freedom in reaching into forbidden fields as the incidental result of a valid enactment, since the state field must give way to the federal end to be reached thereby. *Northern*

Securities Company v. United States, 193 U. S. 197. The only significance of federal supremacy, however, in an area where a valid federal statute reaches, indirectly, into a state field, is that, in the event of any conflict between the two, the fact of conflict adds nothing to the principle applied. In the reverse situation, however, that of valid state action with indirect effect in a field of federal power, the existence of conflict is all important, as that is the controlling factor which determines the ultimate validity of the state action.

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together * * *"
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> *Sinnot v. Davenport*, 22 How. (63 U. S.) 227, 243 (1859);
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> *Kelly v. Washington*, 302 U. S. 1, 10 (1937).

These doctrines can be employed significantly in the case at bar. The cases cited above, dealing with the validity of state statutes despite an incidental effect in fields delegated to the federal government, were largely cases dealing with the efforts of the states to advance some local policy under the state's police power, but which had an incidental effect on interstate commerce. The effect of state action touched on commerce, and there was an absence of conflict with any federal statute or federal policy; the state action was upheld. Where, however, state action infringed

upon *personal freedom* in a field reserved to the federal government, this court has drawn the line and refused to validate that area of state action. Even though the court spoke in terms of "commerce", it was the infringement upon the personal freedom of the subjects of the legislation in issue, and the more vivid implications of such action which prompted this court to limit state power.

Henderson v. Mayor of New York, 92 U. S. 259;
Chy Lung v. Freeman, 92 U. S. 275;
People v. Compagnie General Transatlantique, 107 U. S. 59;
Edwards v. California, 314 U. S. 160 (1941).

It is this which distinguishes the case of *Hines v. Davidowitz*, 312 U. S. 52, from the situation now before the court. The language of the court in that case, as cited by appellant (Brief for Petitioner, pp. 71-72) is quite persuasive as to the position espoused by appellant only when removed from its context and divorced from the facts of the case. *Hines v. Davidowitz* is distinguished from the instant case because, in particulars, the state act regulated the personal freedom of aliens who were the subject of the legislation,[20] and further, and most significant on the issue of the incidental effect of state action on foreign affairs, the state statute violated the policy which Congress has attempted to follow in the federal statute, and there was a resultant *conflict* between the policies

[20] "• • • it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans". 312 U.S. at 68.

of the two statutes. Thus, the Pennsylvania statute required the alien registrants to carry identification cards, which were required to be shown to all police officers upon demand, or prior to obtaining a vehicle or driver's license. The federal statute, however, merely required registration, but not the carrying of identification cards; nor was this a mere technical difference between the two statutes—it was part of a scheme of Congressional policy, which included provisions that the information obtained through registration of aliens was to be kept secret and not revealed except to governmental agencies upon consent of the commissioner and the Attorney-General. (312 U. S. at 73.) This Congressional policy, then, was, in the words of the court, to register aliens, but otherwise "to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against". (312 U. S. at 74.) In short, the Pennsylvania law exceeded the permissible area of state action because (1) it affected the personal freedom of the subjects, who were especially within federal jurisdiction, and (2) it conflicted radically with the policy sought to be engendered by the federal statute. On a broader ground, the decision restricted this area to the federal government, but did not leave the field with no government able to legislate within it.

It would appear, then, that the instant case more nearly approaches that category of cases which deal

with state tax statutes or state food laws or cattle disease laws, to which Mr. Justice Black adverted in *Hines v. Davidowitz,* as being distinct from the situation therein presented; for, here we have no question of an infringement upon personal freedoms, but merely a regulation of inheritance rights, a purely statutory privilege which has always been held to be a matter for exclusive state regulation. Further, there is here no conflict at all with either federal policy or federal statute. If the treaty in question is valid and subsisting, the California statute implements and executes it. *In re Bevilacqua's Estate,* Cal. App. (2d), 161 P. (2d) 589 (1945). That there is no federal policy against reciprocity of inheritance rights is amply evidenced by the imposing array of treaties providing for the same given to us by appellant. (Brief for Petitioner, pp. 93-94.) Further evidence that there is no federal policy violated in allowing the *states* to determine that the rights of aliens to inherit property shall be based on a unitary basis rather than on a national, uniform basis, is to be found in the fact that two treaties, still in force, provide, in effect, that reciprocity shall exist only as to those states, which, in turn, grant it to the citizens of the foreign countries signatory thereto—an invitation by our State Department to the various states to enact statutes of the very sort in issue here.[21] In the absence of an

[21] Thus, Article VII of the Treaty of February 23, 1853 with France (10 Stats. 992, 996), provides:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens

actual conflict between state action and any federal action or policy, authorities which nullify state action on that ground are not in point. *Hines v. Davidowitz*, supra; *United States v. Belmont*, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203.

One very important factor which must be considered along with the distinctions above made, is that the exercise of power by the state in the type of case now before the Court is one exclusively and

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of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States, the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens."

It was this Treaty which led Connecticut to enact its reciprocal inheritance statute, in 1918, Sect. 5055, 2 Gen. Stats. Conn. (1930 Rev.), which reads as follows:

"Any alien resident in the United States, and any citizen of France, so long as France shall accord the same right to citizens of the United States, may purchase, hold, inherit or transmit real estate in this state in as full a manner as native-born citizens * * *"

See also Treaty of Nov. 13, 1937 with Siam (53 Stat. 1731) Article I of which contains substantially the same provision as the Treaty of 1853 with France, above.

It is interesting to note, further, that the Congress has provided for the operation of its Mineral Leasing Act of February 25, 1920 as to aliens to proceed on the basis of a finding of reciprocity. See: 30 U.S.C.A. Sect. 181, 41 Stat. 437; see also 38 Op. Atty. Gen. of U.S. p. 476, (1936), a finding of reciprocity without reference to treaties.

uniquely within the power of the state. To deny to the states the power to condition inheritances in the manner in issue, is to deny the very existence of any power to so condition inheritance. It is, further, to import that the mere invitation, if any is present, to reciprocate is equivalent to direct negotiation, to a coercion of the foreign country.

> "But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible."
>
> Justice Cardozo, in *Steward Machine Co. v. Davis*, 301 U. S. 548 (1936), at p. 589.

The issue is whether the exercise of an exclusive state power must fall because of an incidental effect upon a federal power, and which incidental effect is in no way repugnant to, nor conflicts with the federal power. The fundamental issue before this court is whether a new constitutional limitation is to be created and applied to a province of residual state power, with no corresponding enlargement of federal power or freedom of action in the domain claimed to have been invaded. In short, no valid constitutional basis exists for the proposed foray into state power. The result of such a limitation, if created by this court, would be to deprive the states of the full exercise of a power which no other government possesses, and this without any corresponding enlargement of federal power, which is already, concededly, plenary and unlimited in its own field.

Although state statutes of the nature of the one here in question date back as far as 1825 (see footnote 18, p. 58, supra) the appellant has cited no case in his argument (Petitioner's Brief, pp. 68-75) and we submit none can be found, where the power of the states to pass laws regulating and limiting or even abolishing the rights of aliens to inherit is denied in the absence of treaty provisions. Instead the courts have universally recognized that it is a field of exclusive state power. No urgent reason is apparent why the court should apply a different rule in this case from that which has been applied in so many cases heretofore in our nation's history.

III. THE CUSTODIAN HAS ALWAYS HAD THE BURDEN OF PROOF IN THIS CASE.

The essential element of the statutory amendment to Sections 259, 259.1 and 259.2 of the California Probate Code (see Appendix A, pp. i-iv) in 1945 (Ch. 1160, Calif. Stats.) aside from incorporating the entire statute into one code section (Probate Code Section 259, 1945), was to change the allocation of the burden of proof on the issue of reciprocity of rights of inheritance or succession, from the alien, as the 1941 enactment had provided, to the resident claimant.[22] This was done in the following language (Probate Code Section 259, 1945):

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[22]Senate Bill No. 115, California legislature, reported on by Senate Judiciary Committee with a "do pass" recommendation on March 26, 1947, restores the statute to its original form. (For text of bill see Appendix A, p. iv, infra.)

"It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories, a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the non-existence of such reciprocal right or rights shall be upon the petitioner."

Appellant contends that the court below erred in holding that, despite this amendment, which occurred after trial of this cause, but pending appeal, the Custodian had the burden of proof on the issue of reciprocity. (R. 40.) Initially, it is quite apparent that the court below applied the statute as it read *prior* to amendment, throughout its deliberations. Recurring throughout the opinion of the court below are references to "Sections 259, 259.1 and 259.2" (See R. pp. 32, note 5, 33, 34, 39), and only by way of distinction is there reference to Section 259, 1945. (R. 40.)

Appellant contends that the decision of the lower court, in holding that the Custodian retained the burden of proof which had rested upon him throughout the trial of this issue, is error and contrary to the California cases, which, appellant concedes, must govern on this point. (Brief for Petitioner, p. 76.) As to the alleged failure of the Circuit Court of Ap-

peals to follow the California decisions, it may be noted in passing that all of the authority which appellant cited to the court below as sustaining his position, and which authority was cited to this court in appellant's petition for writ of certiorari, page 20, footnote 9 thereto, has now been entirely abandoned by appellant.

The California rule as to the effect of a change in law pending appeal, and which rule the court below followed, is set forth most cogently in the case of *Vanderbilt v. All Persons*, 163 Cal. 507 (1912).[23] In this case, an action to quiet title, the plaintiff offered into evidence, and it was received, an abstract of title made up and certified after the public records had been destroyed by fire. As of the time of this trial, Section 1855a of the California Code of Civil Procedure did not permit such abstracts to be admitted into evidence. After trial and pending appeal by the defendant in the case, Section 1855a was amended to permit the introduction of such evidence. In the appellate court the plaintiff argued that the error of receiving his abstract into evidence was now cured, since subsequent to the trial the amendment of the statute permitted that very procedure. The California Supreme Court held that the new law did *not* govern on the appeal, saying (163 Cal. at 512):

> "But conceding that now the policy of the law is to admit abstracts in evidence in the court below, does that justify the court in affirming a judgment supported by evidence erroneously ad-

[23] Cited in Brief for Petitioner, p. 80.

mitted at the time of trial? Section 1855a does not in terms, at least, assume any retroactive effect, and while it marks a change in legislative policy, it contains no express authority for this court to apply that amended policy to pending appeals. Appellant, relying upon the plain terms of the section as it existed at the time of the trial, may have omitted to put in all of the proofs of its asserted title. For aught we know, it may be in possession of other evidence which would have been introduced if the cause had been tried upon the rule which now prevails."

Accord:

Barnaby v. Barnaby, 100 Cal. App. 195 (1929);

Morris v. Board of Education, 119 Cal. App. 750;

Lowery v. Hallett, 105 Cal. App. 84, doctrine aff'd in California Supreme Court in *Krause v. Rarity,* 285 P. 879 (1930);

Ex parte Sparks, 120 Cal. 395 (1895).

See:

Ankeny v. Clark, 148 U. S. 345 (1892).

Barnaby v. Barnaby, supra, is precisely in point with the issue of this case. The action was to recover unpaid alimony based on a divorce decree of a sister state, and the issue was whether this decree had the force and effect of a judgment for the payment of money. The plaintiff failed to put in any evidence, beyond the mere allegation, as to the law of the sister state. The California Code was amended *subsequent* to judgment for the plaintiff and after appeal had

been perfected; (the same situation as in the instant case) the amendment allowed California courts to take judicial notice of the laws of sister states. It was held, on appeal, that this amendment could *not* affect the appeal, and a reversal was ordered because the plaintiff had failed to put in evidence on the issue. In the *Barnaby Case,* thus, the plaintiff failed to meet the original procedural requirements of producing evidence on the issue, and was not saved by a subsequent change in procedure which would have obviated the need of producing such evidence at the trial, had the rule existed in her favor at that time. This situation is analogous to the present case, in which the appellant failed to meet the burden of producing evidence as required at the time of trial, and now, upon a subsequent change in the law governing such procedure, hopes to profit on appeal by a defect in the record of his own doing.

There is no conflict in the California cases on this point. The rule in California follows that stated by Sutherland:

> "If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is manifested." 2 Sutherland on Statutory Construction (2d Ed.) Section 674.

In short, changes of procedural law, in California, cannot affect steps in the case which have already been completed or passed. The California cases cited by appellant are all, without exception, distinguishable from the situation in this case, in that in each one of them, the change in law occurred *before* the step in the case which was thus affected had been reached. In the case now before this court, the change in law had occurred *after* the step affected, namely the introduction of evidence at the trial, had been passed. The court below did not err under California law, in holding that the Custodian had failed to meet the burden of proof which was upon him.

CONCLUSION.

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Dated, Richmond, California,
April 2, 1947.

Respectfully submitted,

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(Appendicies A, B and C Follow.)

Appendix A

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the pay-

ment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

California Probate Code, Sections 259, 259.1, 259.2, Stats. 1941, c. 895.

259. *Rights of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estate of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee, or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the

hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

SENATE BILL No. 115

Introduced by Senator DeLap
January 14, 1947

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Section 259 of, and to add Sections 259.1 and 259.2 to, the Probate Code, relating to inheritance rights of aliens.

The people of the State of California do enact as follows:

SECTION 1. Section 259 of the Probate Code is amended to read:

259. The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. ~~It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do~~

~~not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.~~

SEC. 2. Section 259.1 is added to the Probate Code, to read:

259.1 The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

SEC. 3. Section 259.2 is added to the Probate Code, to read:

259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Reported out by Senate Judiciary Committee
March 26, 1947 with a "Do Pass" recommendation.

INSERT

Section 5 (b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U.S.C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Appendix B

STATE STATUTES ON INHERITANCE RIGHTS OF ALIENS.

State	Citation	Provisions
Alabama	Title 47, Sect. 1 Code of Alabama, 1940	Alien, resident or non-resident may take, hold, etc., same as a native citizen (originally enacted 1875)
*Arizona	Sect. 39-111, 3 Ariz. Code Annot., (1939)	Aliens "eligible to citizenship" may take and hold if reciprocity exists; if treaties do not forbid, aliens have 5 years to become citizens and hold realty
Arkansas	§ 272, Pope's Dig. of Stats. of Ark. (1937)	Same as citizens
*California	Section 259, Probate Code	Reciprocity required; burden of proof on local claimant
Colorado	Ch. 7, Sect. 6, 1935 Colo. Stats. Annot.	Same as citizens
*Connecticut	Sect. 5055, 2 Gen. Stats. Conn. (1930 Revision)	Alien residents have same rights as citizens, and citizens of France same if France gives right to U. S. citizens. (orig. 1918)
Delaware	Sect. 3655, Rev. Code of Delaware (1935)	Same as citizens
District of Columbia	Sect. 45-1502, D. C. Code	Aliens can't own realty except by inheritance, unless treaties permit it
Florida	Sect. 731.28, 1 Stats. 1941	Same as citizens
Georgia	§ 79-303, Code of Ga. (1933)	Friendly aliens same as citizens
Idaho	Sect. 14-116, 14-117 Idaho Code Annot. (1943)	Resident aliens same as citizens non-resident aliens have 2 years t claim; escheat to state if no clai
Illinois	Sect. 1 & 2, Ch. 6 Ill. Rev. Stats. (1943)	Same as citizens, but can hol realty for 6 years only

State	Citation	Provisions
Indiana	Sect. 56-504, 56-505 Burns Ind. Stats. Annot. (1933)	All aliens take same as citizens; if realty exceeds 320 acres, alien must dispose of excess within 5 years or excess escheats
Iowa	Sect. 567.1 II Code of Iowa (1946)	Alien can take up to 320 acres; non-resident widow or heirs of alien or citizen can hold realty only for 20 years
Kansas	Sect. 59-511, Gen. Stats. 1943 Supplement	Aliens "eligible to citizenship" take same as citizen; all others as provided in treaties (enacted 1925)
Kentucky	Sect. 381.330, 381.340 Kentucky Rev. Stats. (1942)	Non-resident alien may take and hold realty for 8 years; his heirs get only balance of this term
*Louisiana	Article 1490, Civil Code	Aliens may take by will or by gift only if reciprocity exists (enacted 1825)
Maine	Title 87, Sect. 2, Code of Me.	Friendly aliens, same as citizens
Maryland	Title 3, Sect. 1, Code of Md.	Friendly aliens, same as citizens
Massachusetts	Sect. 1, Ch. 184, vol. 6 Annot. Laws of Mass.	Same as citizens
Michigan	§ 13493, Compiled Laws (1929)	Same as citizens
Minnesota	Sect. 500.22, Laws (1945)	Aliens may own only up to 90,000 square feet of land unless they took by devise or inheritance
Mississippi	Sect. 84, Constitution Section 842, Land and Conveyances, Miss. Code Annot.	Resident aliens, same as citizens; non-resident aliens, absolutely prohibited except may hold for 20 years as security
Missouri	Sect. 15228, Laws	Same as citizens
*Montana	Ch. 104, Sect. 2, Laws of Montana, 1939	Reciprocity required
Nebraska	Sects. 76-402, 76-403, 76-405, Rev. Stats. 1943	Aliens can't own land; widows and heirs have 10 years to sell; resident aliens have 5 years after taking by devise or descent

State	Citation	Provisions
*Nevada	Sections 9894, 9894.01, 9894.02 2 Nev. Comp. Laws Supp. 1931-1941	Reciprocity required; burden of proof on alien; escheat to state if no local heirs and non-reciprocity found
New Hampshire	§ 213-19, Code of N. H.	Resident aliens, same as citizens
New Jersey	Sect. 46:3-18 Rev. Stats. 1937	"Alien friends" same as citizens; either state or federal government may seize realty during war
New Mexico	Sect. 75-121, New Mex. Stats. Annot. 1941	Same as citizens
New York	Sect. 10, Subdiv. 2 Real Prop. Law	Aliens same as citizens. (1944 amendment omitted alien "friends"; designed to give control to Alien Property Custodian in cases of alien enemies)
North Carolina	Sect. 64-1 Gen. Stats. 1943	Same as citizens
North Dakota	Sect. 56-0116 No. Dak. Rev. Code of 1943	Same as citizens
Ohio	Sect. 10503-13, Throckmorton's Ohio Code Annot. (1940)	Same as citizens
*Oklahoma	Title 60, Sect. 121, Stats. (1941) Cf. Title 84 Sect. 229	May hold land for five years but reciprocity as to personalty
*Oregon	Sect. 61-107, 5 Ore. Compl. Laws Annot. (1940)	Reciprocity required; escheat if no eligible heirs
Pennsylvania	Title 68, Sects. 22, 24, Purdon's Penn. Stats. (1936)	Same as citizens, except for alien enemies
Rhode Island	Sect. 1, Ch. 432, Gen. Laws (1938)	Same as citizens
South Carolina	Sect. 8907, Code of Laws (1942)	Same as citizens
South Dakota	Sect. 56.0120, Code of 1939	Same as citizens

State	Citation	Provisions
Tennessee	Sect. 7187, 7189, Williams Tenn. Code Annot. (1934)	Same as citizens
*Texas	Articles 167, 177, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1935)	Reciprocity required as to personalty; aliens cannot own realty unless reciprocity exists (1854)
Utah	Sect. 101-4-24, Utah Code Annot. (1943)	Same as citizens
Vermont	No. statute; 25 Vt. 433	Friendly aliens may inherit
Virginia	Sect. 66, Virginia Code of 1936 Annot.	Aliens, not enemies, same as citizens
Washington	Sect. 10584, Remington's Rev. Stats. Annot. (1940 Supp.)	Aliens can inherit and hold for 16 years
West Virginia	Sect. 3541, Code of 1943	Same as citizens
Wisconsin	Sects. 234.22, 234.23, Stats. (1943)	Resident aliens, same as citizens; non-resident aliens limited to 320 acres
Wyoming	Sect. 88-4004, Rev. Stats. (1931)	Aliens, if direct heirs, may take same as citizens

*States having reciprocity inheritance statutes.

Appendix C

Reciprocal Inheritance Statutes of States Other Than California

Arizona—3 Ariz. Code Annotated (1939)

§ 39-111, *Estate of aliens*—In making title to real property by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or has been an alien; and every alien eligible to citizenship to whom any real property may be devised or may descend, shall have five (5) years to become a citizen of the State and take possession of such property, or shall have five (5) years to sell the same before it shall be declared forfeited, or shall escheat to the State; provided that the treaties of the United States with the nation to which such alien may belong do not otherwise direct; and, provided, further, that aliens eligible to citizenship may take and hold any property, real or personal, in this State, by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal property by devise or descent within the country of such alien.

* * * * * * *

Montana, Laws of Montana (1939)

Chapter 104, *Section 2*. No person shall receive money or property, save and except mining property, as provided in Section Twenty-five, Article III, of the Constitution of the State of Montana, as an heir, devisee and/or legatee of a deceased person leaving an

estate or portion thereof in the State of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

Approved March 3, 1939

* * * * * * *

Nevada, 2 Nev. Comp. Laws, Supp. 1931-1941

Section 9894. Inheritance Rights of Aliens, § 1. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by descent or inheritance, either under the terms of wills or in cases of intestacy, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories moneys originating from the estates of persons dying within such foreign countries.

§ 9894.01 Burden of Proof. § 2. In the cases described in section 1 of this act the burden of proof shall be upon the alien claimant to establish that said reciprocal right to take and said right to receive exist.

§ 9894.02 When Property Escheats. § 3. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the State of Nevada as provided by law in those cases where a person shall die intestate without heirs.

[Sec. 4.] This act shall be in force and effect immediately upon its passage and approval.

(Approved March 28, 1941)

* * * * * * *

Oregon, 5 Ore. Comp. Laws Ann. (1940)

Section 61.107. Right of non-resident aliens to take personal property by descent or inheritance: Escheat. The right of aliens not residing within the United States or its territories, to take personal property or the proceeds thereof in this state by descent or inheritance, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property or the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens, and upon the right of citizens of the United States to receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the State of Oregon, as provided by law in those cases where a person shall die intestate without heirs. [L 1937, ch. 399, § 1, p. 607]

* * * * * * *

Texas, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1937)

Article 177: Aliens shall have and enjoy in this State such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong or by the treaties by such nation with the United States.

Article 167. This title shall not apply * * * to the following (who are or shall become residents) * * *

4. Aliens who are citizens or subjects of a nation which now permits citizens of this State to own land in fee in such country.

* * * * * * *

Connecticut, (1918) 2 Gen. Stats. Conn. (1930 Rev.) *§ 5055.* Any alien resident in the United States, and any citizen of France, so long as France shall accord the same right to citizens of the United States, may purchase, hold, inherit or transmit real estate in this state in as full a manner as native-born citizens (x)

> "Attention is called to the fact that there are now treaties with other countries than France conferring rights upon their citizens to hold real estate."

* * * * * * *

Oklahoma Reciprocal Statute—reciprocity as to personalty § 121, Title 60, Statutes (1941):

"No alien or any person who is not a citizen of the United States shall acquire title to or own land in the State of Oklahoma, except as hereinafter provided,

(x) Note to Statute (in statute book).

but he shall have and enjoy in the State of Oklahoma such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this Act or the Constitution of this State." (Enacted 1910)

* * * * * * *

Louisiana. Article 1490, Civil Code, La. Donations inter vivos and mortis causa may be made in favor of a stranger when the laws of his country do not prohibit similar disposition from being made in favor of a citizen of this State.